United Asian Bank Bhd v Balakrishnan (t/a Balakrishnan Restaurant) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C679 OF 1984
VC GEORGE J
25 APRIL 1991

Civil Procedure *— Discontinuance — Leave to file fresh action — Creditor did not make proper demand on guarantor — Whether court would allow creditor to discontinue action against guarantor with leave to file afresh — Whether time-barred — Discretion of court — Rules of the High Court 1980 O 21 rr 2(1) & 3(1)*

The plaintiffs lent money to the first defendant. The second, third, fourth and fifth defendants guaranteed the first defendant's repayment of the plaintiffs' loan in 1980. In 1984, the plaintiffs sued the defendants and obtained judgment in default of appearance against the third defendant. In March 1990, the third defendant applied successfully to the senior assistant registrar to set aside the default judgment firstly on the ground that he had a defence on the merits. Moreover the third defendant had explained that he was informed by the first defendant that the latter would settle the debt with the plaintiffs. The third defendant then entered appearance and served his defence. In December 1990, the plaintiffs applied to the senior assistant registrar for leave to discontinue the action against the third defendant with liberty to file afresh. The senior assistant registrar allowed the plaintiffs' application and the third defendant appealed to the High Court. The plaintiffs stated that the reason for the discontinuance of its action against the third defendant was because it had only sent a carbon copy of the letter of demand on the first defendant to the third defendant. The plaintiffs therefore claimed that since there was no proper demand on the third defendant which was a condition precedent to the plaintiffs' cause of action against the third defendant, there was accordingly no cause of action against the third defendant. The plaintiffs further claimed that it was on this basis that the third defendant was able to satisfy the senior assistant registrar that he had a defence on the merits. The third defendant, however, claimed that 11 years had passed since the guarantee was provided and the limitation period had thus set in.

Held, dismissing the appeal:

(1) In exercising the powers in respect of the terms to be imposed in discontinuing an action given by O 21 r 3(1) of the Rules of the High Court 1980, the court is entitled to refuse leave to file afresh whether or not limitation has set in. The discretion given to the court is wide.

(2) Since the plaintiff had no cause of action against the third defendant, time had not begun to run.

(3) It was the third defendant who allowed the default judgment to be entered and did not do anything about it until five years had passed. This was the substantial cause for the long delay.
(4) Accordingly the senior assistant registrar had not exercised her discretion on wrong principle.

[Bahasa Malaysia summary

Plaintif telah meminjam wang kepada defendan pertama. Defendan kedua, ketiga, keempat dan kelima telah menjamin pembayaran oleh defendan pertama pinjaman plaintif itu dalam 1980. Dalam 1984, plaintif telah membawa tindakan terhadap defendan pertama hingga kelima dan memperolehi penghakiman ingkar kehadiran terhadap defendan ketiga. Dalam bulan Mac 1990, defendan ketiga telah berjaya memohon kepada penolong kanan pendaftar untuk mengetepikan penghakiman ingkar itu, pertamanya atas alasan bahawa beliau mempunyai pembelaan atas merit. Lagipun, defendan ketiga menerangkan bahawa beliau telah diberitahu oleh defendan pertama bahawa defendan pertama akan menjelaskan hutang dengan plaintif. Defendan ketiga kemudiannya memasukkan kehadiran dan menyampaikan pembelaannya. Dalam bulan Disember 1990, plaintif memohon kepada penolong kanan pendaftar untuk kebenaran tidak meneruskan tindakannya terhadap defendan ketiga dengan kebebasan memulakan tindakan semula. Penolong kanan pendaftar telah membenarkan permohonan plaintif dan defendan ketiga telah merayu kepada Mahkamah Tinggi. Plaintif menyatakan bahawa sebab ia tidak meneruskan tindakan terhadap defendan ketiga ialah kerana ia cuma telah mengirim satu salinan karbon surat tuntutan ke atas defendan pertama kepada defendan ketiga. Maka plaintif menuntut bahawa oleh kerana tidak ada tuntutan yang betul ke atas defendan ketiga yang merupakan prasyarat kepada kausa tindakan plaintif terhadap defendan ketiga, jadi tidak ada kausa tindakan terhadap defendan ketiga. Plaintif selanjutnya menuntut bahawa adalah atas alasan inilah yang defendan ketiga berjaya memuaskan penolong kanan pendaftar bahawa beliau mempunyai pembelaan atas merit. Defendan ketiga, walau bagaimanapun, menuntut bahawa 11 tahun telah berlalu sejak jaminan itu diberikan dan had masa lantaran itu telah timbul.

Diputuskan, menolak rayuan itu:
(1) Dalam menjalankan kuasa berkenaan dengan syarat yang harus dikenakan dalam tidak meneruskan sesuatu tindakan yang diberikan oleh A 21 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah berhak enggan memberikan kebenaran memulakan tindakan semula sama ada atau tidak had masa telah timbul. Budi bicara yang diberikan kepada mahkamah adalah lebar.
(2) Oleh kerana plaintif tidak ada kausa tindakan terhadap defendan ketiga, masa belum mula berjalan.
(3) Defendan ketigalah yang telah membenarkan penghakiman ingkar dimasukkan dan tidak membuat apa-apa tentangnya sehingga

A lima tahun telah berlalu. Ini adalah sebab yang penting untuk kelengahan yang panjang ini.

(4) Jadi penolong kanan pendaftar tidak menjalankan budi bicaranya atas prinsip yang salah.]

B **Notes**

For cases on discontinuance, see 2 *Mallal's Digest* (4th Ed) paras 800–804.

Cases referred to

1 *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid* C *v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (folld)

2 *Hess v Labouchere* 14 TLR 350 (folld)

3 *Robertson v Purdey* [1906] 2 Ch 615 (refd)

4 *Fox v Star Newspaper Co* [1898] 1 QB 636 (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 21 rr 2(1), 3(1)

Patents, Designs and Trade Marks Act 1883 [UK] s 19

R Devadason (*Devadason & Devadason*) for the appellant/third defendant.

E *M Sinniah* (*Sykt KL Rekhraj*) for the respondents/plaintiffs.

Cur Adv Vult

VC George J: The writ herein with statement of claim was caused to be issued on 15 March 1984. The claim was in respect of amounts outstanding F on advances to the first defendant guaranteed by the other defendants. Judgment in default of appearance was entered against the third defendant guarantor (and the second defendant) on 9 May 1984 for $33,996.62 with interest thereon at 8.5%pa on monthly rests from 1 February 1984 until realization and for the further amount of $6,738.82 with interest thereon at G 14.75%pa on daily rests from 1 February 1984 until realization. The third defendant was notified of the terms of the default judgment and a demand was made for payment of the judgment sum. He had apparently ignored the service of the writ and statement of claim and he had ignored this demand as well.

On 19 December 1989 the third defendant, reacting to a bankruptcy H notice that the plaintiffs had served on him, took out his application to set aside the default judgment. This was opposed. The learned senior assistant registrar allowed the application. The third defendant had explained that he had been told by the borrower first defendant that he would settle his debt which is why the third defendant had not done anything about the judgment. This explanation apparently was accepted by the senior assistant I registrar. The third defendant had also managed to satisfy the senior assistant registrar that he had a defence on the merits. The default judgment was set aside on 5 March 1990 and on or about 14 March 1990 the third defendant entered an appearance and filed and served his defence.

Meanwhile on 6 March 1990 the plaintiffs had filed a notice of appeal against the senior assistant registrar's order setting aside the default judgment. A few days before that, on 1 March 1990, the plaintiffs had also filed an application to have the default judgment amended to put right the order in the judgment in respect of interests payable after the date of judgment in respect of which the plaintiffs had obtained more than the 8%pa that they were at that time statutorily entitled. That summons became of academic interest because of the order of the senior assistant registrar setting aside the default judgment. The plaintiffs did not proceed with it as against the third defendant.

The appeal came up for disposal before me on 11 June 1990 when it was adjourned sine die. The relevant notes of proceedings show that when the appeal was called counsel for the plaintiffs informed the court that the plaintiffs proposed withdrawing the action in doing which they would seek liberty to file afresh. He asked for the appeal to be, in the meantime, adjourned sine die and it was so adjourned on 11 June 1990.

However, nothing more was done until 19 December 1990 well before which date the pleadings in respect of the matter were deemed to have been closed vis-a-vis the third defendant in that, as has been seen, he had filed and served the statement of defence on or about 14 March 1990. On 19 December 1990 the plaintiffs filed their application for leave to discontinue the action as against the third defendant with liberty to file afresh. This was heard on 17 January 1991 when the learned senior assistant registrar gave the plaintiffs an order in terms of the application.

The matter before me is the third defendant's appeal against the decision of the senior assistant registrar granting the plaintiffs liberty to file afresh.

Order 21 r 2(1) [of the Rules of the High Court 1980] provides that a plaintiff in an action begun by writ may without leave discontinue the action not later than 14 days after service of the defence. Order 21 r 3(1) in effect provides that once the 14 days after service of the defence has passed discontinuance may be only with leave, in granting which the court is empowered to impose terms as it thinks just, inter alia, in respect of costs and in respect of the bringing of a subsequent action.

The plaintiffs give as their reason for wanting to discontinue, the decision of the Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd*[1] which was to the effect that simply sending a carbon copy to the guarantor of a letter of demand on the principal borrower does not amount to a demand on the guarantor. In the instant case apparently the purported demand on the third defendant guarantor (which was a condition precedent to a cause of action arising against him) was a somewhat similar carbon copy. The plaintiffs apparently think that in the face of the said Supreme Court decision, they would be bound to fail in the instant case as against the third defendant in that when the writ was caused to be issued, in fact there was no cause of action as against the third defendant guarantor because there had not been a proper demand made on him. Counsel for the plaintiffs pointed out that it was on that basis that the third defendant was able to satisfy the court that he had a defence on the merits. It follows, it was argued, that contrary to the submission of the third defendant's counsel, time had not begun to run

A against the third defendant. I agree with that submission. I also agree that accordingly, the submission by counsel for the third defendant that the action is barred by limitation has no merit. However, in exercising the powers in respect of terms to be imposed in discontinuing an action given by O 21 r 3(1), the court is entitled to refuse leave to file afresh whether or not limitation has set in. The discretion given to the court is wide. The court will consider all the circumstances and if it seems just, can and will impose a term that no other action shall be brought — *Hess v Labouchere*.[2]

In *Robertson v Purdey*[3] which was an action for infringement of a patent, the plaintiff shortly before trial discovered that his specification needed correction and that without which correction he would not succeed in the action. He applied for leave to discontinue with liberty to file afresh. It was held that on the peculiar facts of the case, leave should only be given on terms of the plaintiff not bringing any action in respect of the infringement alleged in the present action. The judge, Buckley J, pointed out that because of the terms of s 19 of the Patents, Designs and Trade Marks Act 1883, he was obliged to impose the terms as otherwise the court will in effect enable the plaintiff to get round the statutory impediment imposed by the said s 19.

In the English Court of Appeal case of *Fox v Star Newspaper Co*,[4] Chitty LJ referred to the principle behind the rule [at p 639]:

> The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. ... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

In the instant case before the senior assistant registrar, it would seem from her notes of proceedings that the attempt to obtain leave to file afresh was opposed substantially on the contention that limitation had set in. As has been seen, if in fact there was no cause of action as against the guarantor, then time had not begun to run against him and accordingly the limitation argument is without merit, which no doubt substantially influenced the learned senior assistant registrar's decision to give the plaintiff leave to file afresh.

The third defendant had provided his guarantee on 13 May 1980. The writ was caused to be issued on 13 March 1984. Judgment was entered against the third defendant on 9 May 1984. It was a regular judgment. He did nothing about it until he filed his application to set aside on 19 December 1989. He stated in the summons he was entitled *ex debito justitiae* to the order. He succeeded in having the default judgment set aside but not *ex debito justitiae*. It was set aside on 5 March 1990 because the court in its discretion accepted his explanation for allowing default judgment to be entered and his explanation for not doing anything about it for over five years and also found that he had a defence on the merits.

Before me it was pointed out, inter alia, that 11 long years had passed since the guarantee was provided and to allow the bank to now start afresh against the third defendant would be an injustice. However on the facts, all that the third defendant can complain vis-a-vis the delay is the period from the fourteenth day after he delivered his defence on 14 March 1990 until the application to discontinue was filed which was on 19 December 1990, ie some nine months. It is the third defendant allowing the default judgment to be entered and not doing anything about it until five years had passed that is the substantial cause for the long delay that he complains about. Accordingly, it is not at all possible to say that the learned senior assistant registrar, in dealing with the application (encl 36 in the court's file), had exercised her discretion on some wrong principle or that for some other reason the appeal should be allowed.

The appeal has to be and is dismissed with costs.

Appeal dismissed.

Reported by Wong Kian Kheong